

**IN THE SUPREME COURT OF FLORIDA**

INQUIRY CONCERNING  
A JUDGE NO. 02-487

Supreme Court Case  
No.: SC03-1171

**RESPONDENT'S MOTION IN LIMINE TO  
EXCLUDE STATEMENT OF COLONEL GREGORY P. HOLDER,  
DATED MARCH 7, 2003**

The Honorable Gregory P. Holder ("Judge Holder"), by counsel, files with the Hearing Panel of the Florida Judicial Qualifications Commission ("the Panel") this Motion in Limine to Exclude the Statement of Colonel Gregory P. Holder, dated March 7, 2003 ("Statement").

1. David Leta ("Leta") is a Colonel in the United States Air Force Reserves.
2. Leta was responsible for the Air Force's investigation of Judge Holder concerning his alleged plagiarism of an Air War College paper.
3. On March 7, 2003, Leta arrived at Judge Holder's chambers unannounced and interviewed Judge Holder. This interview was purportedly transcribed and entitled Statement of Colonel Gregory P. Holder, dated March 7, 2003. *See Exhibit 1.*

4. Following the completion of the Air Force's investigation, on December 19, 2003, Major General Fiscus, The Judge Advocate General of the Air Force, having fully considered all of the evidence, restored Colonel Holder's designation as a Judge Advocate.

5. Judge Holder has moved to exclude all testimony by Leta at the Final Hearing. *See* Judge Holder's Motion in Limine to Exclude all Testimony of David Leta.

6. The Florida Judicial Qualifications Commission intends to introduce the testimony of Leta to identify the Statement. *See* Florida Judicial Qualifications Commission's Prehearing Statement, filed August 25, 2004.

7. Section 90.901 of the Florida Evidence Code provides that "[a]uthentication or identification of evidence is required as a condition precedent to its admissibility." § 90.901, Fla. Stat (2004).

8. The authentication requirement exists, among other things, to prevent fraud. 5 Mueller & Kirkpatrick, *Federal Evidence* § 513 (2d ed.). A court resolving a dispute should not assume that a matter offered in evidence is what it appears to be on its face, or what the offering party claims it to be, but rather, must require formal proof of the identity or nature of the matter in question. *Id.*

9. Without Leta's testimony, the Statement cannot be authenticated.
10. Thus, if the Panel excludes Leta's testimony at the Final Hearing or Leta fails to appear at the Final Hearing, the Statement must be excluded from entry into evidence.
11. Additionally, Judge Holder's counsel made a telephonic request to depose Leta. *See Exhibit 2.*
12. Acting under the authority of 32 C.F.R. Part 97, the DOD refused Judge Holder's request to depose Leta unless Judge Holder disclosed attorney work product. *See Exhibit 2.*
13. Where a Federal Agency will not allow its employee to attend a pre-trial deposition, the Florida Supreme Court held that exclusion of all testimony of a Department of Justice employee ("DOJ") is appropriate. *State v. Tascarella*, 580 So.2d 154 (Fla. 1991). (The trial court excluded all trial testimony of DOJ employees because Tascarella was not afforded an opportunity to depose them prior to trial. The Florida Supreme Court agreed that Tascarella, "would be prejudiced if forced to confront these witnesses at trial without pretrial discovery," and exclusion of all their testimony at trial was proper).
14. As the transcription of an unscheduled interview, the Statement contains both Leta's factual recitations and opinions.

15. The admission into evidence of the Statement would constitute the de facto testimony of Leta.

16. Pursuant to *Tascarella*, Leta is ineligible to testify at the Final Hearing; therefore, the Statement cannot be introduced into evidence at the Final Hearing.

17. Moreover, the unscheduled interview of Judge Holder by Leta was preserved via tape recording and later transcribed.

18. Judge Holder was never provided with the opportunity to confirm the accuracy of the transcription and maintains that the transcription is imperfect.

19. The Statement is not the best evidence of the unscheduled interview conducted by Leta. Accordingly, the Statement is inadmissible. *See* § 90.951, Fla. Stat.; § 90.953, Fla. Stat.

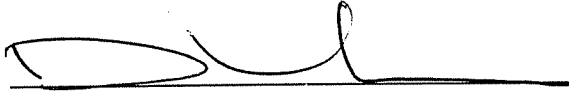
20. Finally, under Section 90.403, Florida Statutes, the prejudicial nature of the evidence outweighs any probative value.

WHEREFORE, Judge Holder requests that this Panel enter an order precluding the introduction of the Statement into evidence at the Final Hearing.

***(Attorney signature appears on following page.)***

Dated: August 25, 2004

Respectfully Submitted,



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### CERTIFICATE OF SERVICE

I certify that on August 25, 2004, a copy of the foregoing has been served by telecopier to Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; and by telecopier to: Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Beranek, Counsel to the Hearing Panel, Ausley

& McMullen, P.O. Box 391, Tallahassee, Florida 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629.



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Attorney

STATEMENT  
OF  
COLONEL  
GREGORY P. HOLDER

Col Leta: The time is about 10 after 1:00. It is March 7<sup>th</sup>, 2003. My name of course is Col Dave Leta. I have been appointed by Col McClain to investigate allegations involving you Col Greg Holder involving plagerisd portions of the paper that you submitted in partial fulfillment of the Air War College graduation. The offense of course is conduct unbecoming an officer and false official statement. And I have been advised to read you your Article 31 rights, so I will do that, whether or not you are in status, I am still going to do that.

Col Holder: I am not in status.

Col Leta: I didn't think you were. I'll read you rights anyways and we'll go from there. Under Article 31 of the UCMJ, you may remain silent that is say nothing at all; any statement you make, oral or written, may be used as evidence against you in a trial by court-martial or in other judicial or administrative proceedings; you have the right to consult a lawyer and to have a lawyer present during this interview; you have the right to military legal counsel, free of charge; in addition to military counsel, you are entitled to civilian counsel of your own choosing, at your own expense; you may request a lawyer at any time during this interview; if you decide to answer questions, you may stop the questioning at any time. Do you understand your rights?

Col Holder: Yes

Col Leta: Okay. Do you want a lawyer?

Col Holder: I am thinking. Well I have more faith in the Air Force than I do other agencies. At this point no.

Col Leta: Are you willing to answer questions?

Col Holder: At this point yes.

Col Leta: Okay.

Col Holder: Let me see those letters, Dave. I want to make copies of those letters before you leave. Go ahead.

Col Leta: You know Col Dave Hoard, don't you?

Col Holder: Dave Hoard, Yes

Col Leta: You've been friends with him a number of years?

EXHIBIT

tabbies

1

1 Col Holder: Of course.  
2  
3 Col Leta: Yeah, and what's your relationship with Dave Hoard?  
4  
5 Col Holder: Dave was here. He worked at Carlton Fields. He worked at Florida Power. And  
6 then he left. His wife worked at the credit union. MacDill Credit Union. I 've known Dave and  
7 Cheri for many . . . .  
8  
9 Col Leta: And at some point Dave completed war college?  
10  
11 Col Holder: Yeah. I'm sure he did.  
12  
13 Col Leta: Did you ever talk to him about it?  
14  
15 Col Holder: Yeah.  
16  
17 Col Leta: Do you recall what you talked to him about?  
18  
19 Col Holder: I talked to him about the dirty purples. I talked to him about. I am sure we  
20 discussed the requirements of the course. He gave me web sites to find dirty purples. I accessed  
21 those. There were three or four web sites, I accessed. I don't recall what else to be honest with  
22 you.  
23  
24 Col Leta: Did you ever talk about the Air War College paper with him?  
25  
26 Col Holder: I don't recall.  
27  
28 Col Leta: Okay  
29  
30 Interruption by phone call - not transcribed.  
31  
32 Col Leta: Now. Your Air War College paper, what did you write on, do you recall?  
33  
34 Col Holder: No.  
35  
36 Col Leta: Do you recall when you submitted it?  
37  
38 Col Holder: No.  
39  
40 Col Leta: The year is what I am talking about now?  
41  
42 Col Holder: I think . . . Mary Perry was here. We took the course together. I . . . it had to be '98.  
43 I think. Dave, that's the best I can do. I think '98. I mean, we can go to the roster and it would



1 be on there.

2  
3 Col Leta: Okay

4  
5 Col Holder: As far as the completion date. Now when the paper was submitted, because the  
6 course I did it in seminar, it started in August of one year and finished in June of the next year.

7  
8 Col Leta: Understand.

9  
10 Col Holder: So I don't even remember which section if it was section one, two, three, section  
11 four was read the books- you know, I read Killer Angels that I remember. It was one book that I  
12 read. 'Cause I loved that book. But as far as what I wrote on, I have no recollection.

13  
14 Col Leta: Okay. You may have answered this. Did you talk to Dave at all about the paper?  
15 The requirements, Dave Hoard?

16  
17 Col Holder: We talked about the requirements. It seems to me that we talked about the paper, we  
18 talked about the dirty purples, we talked about study techniques. And I told him I was taking it in  
19 seminar.

20  
21 Col Leta: Did you ever ask him to fax you a copy of his paper?

22  
23 Col Holder: I think he sent me three or four papers. It seems to me I had three or four, because I  
24 remember passing them on to people to look at, as far as these are examples of the requirements.  
25 Yeah. So I think I had three or four. I remember they were in my desk for a long time.

26  
27 Col Leta: Let me show you a copy of something see if that helps jog your memory?

28  
29 Col Holder: Right. Yeah. Right. This looks like the one -- one of the ones he sent me. I think  
30 he sent me more than one.

31  
32 Col Leta: Okay and as far as you know that's the paper that he submitted?

33  
34 Col Holder: I couldn't tell you that.

35  
36 Col Leta: Okay, but it's one of the papers that he sent you?

37  
38 Col Holder: Yeah.

39  
40 Col Leta: Okay, all right. And do you recall if you wrote on the same topic?

41  
42 Col Holder: I don't recall.

1 Col Leta: Okay.

2  
3 Col Holder: The only thing I do recall is, the paper had a written requirement of so many pages  
4 and my paper exceeded that by sixteen pages and so I ended up at the very last second cutting out  
5 sixteen pages. I think it had to be twenty pages perhaps. I cut out sixteen. And I received a  
6 marginal grade on the paper, because it was disjointed, because I had to cut out so much. I had a  
7 lot more writing than was necessary, or required or allowed.

8  
9 Col Leta: Why don't you take a look at this one? This is a different paper. Do you recognize  
10 that paper? Should be your signature on the second page.

11  
12 Col Holder: That's my signature.

13  
14 Col Leta: Okay.

15  
16 Col Holder: Do I recognize it as being my paper?

17  
18 Col Leta: Yes sir.

19  
20 Col Holder: I couldn't tell you that? It has my signature on the second page. Could I look at it  
21 and tell you that I wrote this. No, Dave I couldn't it. Not at this point. I just couldn't.  
22 I couldn't do it.

23  
24 Col Leta: But that's your signature on the second page?

25  
26 Col Holder: That is my signature on the second page.

27  
28 Col Leta: Does the date January 1998 ring a bell?

29  
30 Col Holder: No.

31  
32 Col Leta: Okay and the topic doesn't ring a bell?

33  
34 Col Holder: Let me see. I'm pretty sure that's what I did. That I seem to remember, because I  
35 was interested in that topic.

36  
37 Col Leta: Now, did you keep a copy of your paper?

38  
39 Col Holder: No. It was poor work -- you know again disjointed. At that point in 1998, especially  
40 January, December in that period of time, I was in the juvenile division. And it wasn't until that  
41 very month that I was assigned out of the juvenile division. And I was dealing with  
42 delinquencies, dependencies, termination of parental rights and the workload was just  
43 tremendous - tremendous. And there was a case involved that in January 1997 -- tragic torture of

1 a child – those were a tough two years. Again at the time I was writing the paper I was still in the  
2 juvenile division. So my focus was different things, more than an air war college.

3  
4 Col Leta: Understand. Let me show you a third copy of the paper. This is why this is the reason  
5 that brings me here.

6  
7 Col Holder: Yeah.

8  
9 Col Leta: The highlighted material.

10  
11 Col Holder: Okay

12  
13 Col Leta: It's verbatim from the paper that Dave Hoard faxed you.

14  
15 Col Holder: Really.

16  
17 Col Leta: Really.

18  
19 Irrelevant conversation not transcribed

20  
21 Col Holder: All right.

22  
23 Col Leta: Do you recall how you whether you typed the paper yourself?

24  
25 Col Holder: I did. I typed every bit of it myself.

26  
27 Col Leta: Did you use your office computer or home or somewhere else or out at the base?

28  
29 Col Holder: It wasn't the base. It was either home or office. I don't recall which.

30  
31 Col Leta: Did you keep a disk a copy of your paper on disk?

32  
33 Col Holder: No. I wish I had now. Dave let me just say this. I could tell you that I went out and  
34 did the research and wrote the paper. And as I recall Hoard had just completed the Air War  
35 College the year before I took it. It would be absolutely stupid to copy his paper. And I didn't  
36 copy his paper. I can't explain. I can't tell you that that's what I submitted. But I know I had a  
37 copy of his paper and two or three others. I know I looked at them as guides. I know I picked a  
38 topic I was interested in. I know I went out and got the books from the base. I know I checked  
39 them out. I know I did the research. I know I wrote the paper which was far too long. And I  
40 know I cut the heck out of it in the last couple of weeks to meet the requirements as far as timing  
41 goes. I know I got a marginal on the paper, because it was disjointed. But I can tell you this. I  
42 didn't copy Dave Hoard's paper.

1 Col Leta: On the two copies of these two papers and we'll use the one that is not highlighted. Do  
2 you recognize those comments at all? And you may or may not. I don't know.

3  
4 Col Holder: No. If there were any comments on his paper, I don't recall any?

5  
6 Col Leta: No, I mean on the ones you got back?

7  
8 Col Holder: Oh, no I don't recall. No. I looked at it. And what I really looked at again given  
9 what was going on in my personal life at that time as far as the work here, was did I pass or not.  
10 Did I meet the requirements or not. And as far as anything else went, I don't remember when in  
11 the course when we wrote the paper if it was the first section, the second section, I don't recall. I  
12 think you had an option at that point. Which option I took I don't recall that either. But I didn't  
13 really look at the comments other than the final grade. And then I just threw it away. Never  
14 looked at it again. I gave a copy of my paper and the other papers that Dave had sent me to  
15 another person that was writing. Maybe I did write it the first section, because I gave those  
16 papers as a guide to somebody that was behind me writing their paper for the next section.

17  
18 Col Leta: Who did you give them as a guide to?

19  
20 Col Holder: I don't know. We had Army and Air Force personnel in our course our seminar at  
21 MacDill. MacDill may have a list of the people that were in the course. I couldn't tell you who I  
22 gave it to. To be honest with you.

23  
24 Col Leta: But it was in the seminar the seminar after you completed it so that would have been?

25  
26 Col Holder: No I think it was our seminar. I think you had the option of doing the paper first  
27 section or second section.

28  
29 Col Leta: Right.

30  
31 Col Holder: And it seems to me, that I wrote mine first section.

32  
33 Col Leta: So you gave it to other people in your seminar?

34  
35 Col Holder: I think so, I think so. Yeah, I know I gave it to somebody. I know I had them in this  
36 drawer for a long period of time. The lower left hand drawer. Mine, Dave's and two or three  
37 others that I think Dave sent me. Maybe other people sent them to me. I don't remember. But I  
38 can tell you that I did my own research and wrote what I recall to be my own work. Yeah, it  
39 wasn't a difficult requirement. There would be no reason to copy David's. I am one of those  
40 learners that likes to touch and feel something to see what the requirements are. I learn best that  
41 way. In college we'd talk about different types of learners. I am one of those that likes to touch  
42 things. Then I learn better. But again there'd be absolutely no reason to copy his. The  
43 requirement wasn't that difficult. All you had to do was check the books out. They told you

1 what books to check out. I brought em all back to my office, which at that time was across the  
2 hall at least in January. In December '97, it was across the street. Well, what I do remember was  
3 having them in my desk across the hall. But that could have been before the paper was submitted  
4 or after - I don't recall that. I just recall them being in my lower left hand drawer for a long  
5 period of time.

6  
7 Col Leta: Do you recognize the font on the paper itself as being font that you would have used?

8  
9 Col Holder: No. No. That's what looks strange to me. I mean, why would I use that font, which  
10 looks like a cut and paste. You're talking about the cover page?

11  
12 Col Leta: The cover page and and I mean the remainder is sort of generic font.

13  
14 Col Holder: Yeah. I would use a Times New Roman font. Or a Courier. I would.  
15 I would not type it like this. That is not my work. I took great pride in my typing. I am an  
16 excellent typist. I would not submit something that looks like this, which looks like a piece of  
17 crap. David I wouldn't do it. I never have and I never will.

18  
19 Col Leta: But the rest of it as far as the font on the rest of it?

20  
21 Col Holder: It could be my font. Again I would use probably a Times New Roman.

22  
23 Col Leta: This looks like a Courier?

24  
25 Col Holder: Maybe a Courier. Times New Roman is my favorite.

26  
27 Col Leta: You don't happen to have a list of the folks that were in your seminar, or remember  
28 how many, the names of the people?

29  
30 Col Holder: Mary's the only one I remember. Mary Perry. Now over at Belgium. Want her e-  
31 mail?

32  
33 Col Leta: Sure.

34  
35 Col Holder: Her personal e-mail is mvp5023@aol.com. Again, there was an Air Force Lt Col.  
36 There was a Comm guy. He's retired now. He lives in the area. I don't remember his name.  
37 There was an Army Lt Col who works for HUD, black, male. Big, husky guy. He's still around.  
38 He was a Reservist. Those. There were two females other than Mary that I recall. One was at  
39 SOCOM. The other I think was at CENTCOM. Yeah, everybody by now has retired or moved  
40 on. Many of which retired in this area.

41  
42 Col Leta: Now this is the Hoard paper. Is that your handwriting there on that on the cover?  
43

1 Col Holder: That appears to be my handwriting.

2  
3 Col Leta: Where his name is crossed out and it says our address, that's your handwriting?

4  
5 Col Holder: Right. That appears to be my handwriting.

6  
7 Col Leta: On page roman numeral ii, that's your handwriting there?

8  
9 Col Holder: That appears to be mine.

10  
11 Col Leta: There does not seem to be any other handwriting in there. You can take a look at it for  
12 yourself, but I did not see any other handwriting in there.

13  
14 Col Holder: I just see circles of some of the cites. I don't know who circled the cites. There are  
15 circles on cites 4 and 13.

16  
17 Col Leta: I mean circles are sort of generic. I did not consider that to be handwriting, per se.

18  
19 Col Holder: No. Not at all. Not at all. Yeah that title page appears to be mine. Handwriting.  
20 This might have been the very paper that I passed on to whoever else whoever I gave it to.

21  
22 Col Leta: But you think it was somebody in the seminar?

23  
24 Col Holder: I have no recollection.

25  
26 Col Leta: Okay. So you're not sure?

27  
28 Col Holder: I'm guessing. I'm guessing.

29  
30 Col Leta: It could have been in the seminar, the next seminar?

31  
32 Col Holder: It could have been in the next seminar or two years later. Cause again, I had those  
33 papers several of them in my desk for a long period of time. I gave them to someone. I don't  
34 know who.

35  
36 Col Leta: But you do not believe that this is the paper you submitted, is actually what you're  
37 saying?

38  
39 Col Holder: I don't believe it.

40  
41 Col Leta: You don't recognize that as your style or what?

42  
43 Col Holder: Well, it is definitely not my style.

1 Col Leta: Because of the cover sheet or beyond that?  
2  
3 Col Holder: Beyond that I can't tell you. The cover sheet definitely.  
4  
5 Col Leta: That is your signature on the second page.  
6  
7 Col Holder: That is my signature on the second page.  
8  
9 Col Holder: The cover page is definitely. I would not do that. I wouldn't submit something like  
10 that. I just can't imagine that I did.  
11  
12 Col Leta: Okay.  
13  
14 Col Holder: Again I can't recall. But, I would type the whole thing over again. If I was going to  
15 bold it I would bold it. This looks like a cut and paste job.  
16  
17 Col Leta: Understand. And I am just asking what about the . . . the . . . the written work itself,  
18 about the style, the writing, does that appear to be your style, is what I am trying to say?  
19  
20 Col Holder: I can't answer that.  
21  
22 Col Leta: Okay.  
23  
24 Col Holder: Again this is a very rigid assignment. It. You know basically go to the books.  
25 Research it. Analyze it. But it wasn't the kind of writing that we often do, as far as advocacy.  
26 When did Dave submit his?  
27  
28 Col Leta: His was submitted in '96  
29  
30 Col Holder: Yeah. What month?  
31  
32 Col Leta: January.  
33  
34 Col Holder: Two years. Again, if I were going to copy somebody's work that would just be  
35 stupid.  
36  
37 Turn to second side of tape  
38  
39 Col Holder: Is that your tape recorder.  
40  
41 Col Leta: No they don't provide me with a tape recorder. Obviously, given what's gone on down  
42 here in the last couple of years, you have people who don't particularly care for you either inside  
43 this building and other places?

1 Col Holder: I do.

2  
3 Col Leta: Are there personal enemies still in the building, I assume there are?

4  
5 Col Holder: Still.

6  
7 Col Leta: Is there anybody you think I should talk to?

8  
9 Col Holder: About this?

10  
11 Col Leta: Yes.

12  
13 Col Holder: No. Noone would have any knowledge of this.

14  
15 Col Leta: Okay.

16  
17 Col Holder: I mean if you are looking for character witnesses. If you are asking me who you  
18 should talk to with respect to my character that's a different question.

19  
20 Col Leta: No. I'm talking specifically on the allegation.

21  
22 Col Holder: Noone would have any knowledge of that. My judicial assistant at the time who  
23 retired for health reasons knows that I typed my paper, but other than that.

24  
25 Col Leta: I mean you didn't show your paper at the time to anybody?

26  
27 Col Holder: No.

28  
29 Col Leta: that could say I have a recollection of what my paper looked like, you know like your  
30 wife, did you even show it your paper to your wife for example, did she take a look at it?

31  
32 Col Holder: No. No. I don't think so. I don't think I did. I don't think anyone else saw it to my  
33 recollection. Mary Perry and I would have talked about it. But I don't think she saw it, that I  
34 recall. I mean she was a neighbor. Six blocks away. But I don't think I don't think she wrote  
35 the same term. I think she waited a term, I think. I might have shown it to her. I just don't  
36 know. It's been so long. [Inaudible] My paper was in this building. My office was broken into  
37 by my colleague.

38  
39 Col Leta: Judge Bonnano?

40  
41 Col Holder: Yeah. The same one who had access to all the computers. Now you've got me even  
42 more paranoid. David, am I being set up or what. I have no knowledge of what I submitted. I  
43 couldn't tell you that was my paper or wasn't paper. I couldn't tell you. I couldn't testify under



1 oath.

2  
3 Col Leta: Could have been your paper?

4  
5 Col Holder: I have no idea.

6  
7 Col Leta: Okay. I'm just asking questions at this point.

8  
9 Col Holder: I'm just giving you the best answers I can. You know was it mailed from this  
10 building. Yeah I think it was. Whose hands it went to through before it was mailed out, I  
11 couldn't tell you that. Who touched it. Who could have changed it. And I told you I had Dave's  
12 paper and those other papers in the lower left hand drawer for a long period of time.

13  
14 Col Leta: Then you passed them on to somebody?

15  
16 Col Holder: Yeah to somebody.

17  
18 Col Leta: One of the guys in the seminar or gals, but you don't know which one?

19  
20 Col Holder: Well again I modified that it could have been somebody in the next seminar. It  
21 could have been somebody at another base. Cause again I had them for awhile. I gave them to  
22 someone. Said here, here's here are examples of papers. Whether acceptable or unacceptable.  
23 But I know I had more than David's. I had some others. I think he sent them to me What else  
24 can I answer.

25  
26 Col Leta: I think we have covered it.

27  
28 Col Holder: I don't know if I've answered anything. I have more questions than answers right  
29 now.

30  
31 Col Leta: I mean as far as my questions are concerned to you I think we have covered all the  
32 questions.

33  
34 Col Holder: Right.

35  
36 Col Leta: I mean. We've covered the paper. I don't know if there is anything else that I can ask  
37 you.

38  
39 Col Holder: I don't either -- not that I can answer.

40  
41 Col Leta: Is there anything that you think that I should ask you that I haven't asked you?

42  
43 Col Holder: No, because I can't tell you it was my paper. I can't tell you that the one that was

1 received by Air War College was the one I wrote. I can identify some of my handwriting. I told  
2 you what I did with the paper that Dave sent me. That's about it. Cause again I had no reason  
3 not to pass it on to somebody else. (Inaudible). Let me ask you this. Where has this been since  
4 1998.

5  
6 Col Leta: I can't go into that obviously. As to what's what is going on. Somebody . . . somebody  
7 will at some point. But that's beyond what I can tell you at this point.

8  
9 Col Holder: What in the world's been happening to whatever paper they received and think was  
10 plagiarized from David's since 1998 - five - four or five years?

11  
12 Col Leta: I think that's the end of this interview. You can certainly make copies of my letters for  
13 you.

14  
15 Col Holder: Yeah.

16  
17 Col Leta: You're welcome to those.

18  
19 Col Holder: I'll do that.

20  
21 Col Leta: Well go from there.

22  
23 Col Holder: Where are we going from there?

24  
25 Col Leta: Well. This is an official investigation.. It is privileged in the sense that my report will  
26 be made to Col McClain or higher authority for such use as deemed appropriate. Now it says  
27 here you are ordered or directed not to divulge the nature of the investigation or the questions,  
28 answers, or discussions included in this interview with anyone except defense counsel if you  
29 want one or have one, or a chaplain who has authority for client confidentiality. You may also  
30 seek assistance from your command chain or from the mental health community, but be advised  
31 that such communications may not be privileged. If you are under stress related to this interview  
32 contact me immediately and arrangements will be made for you to receive assistance. Do not  
33 discuss this interview beyond these approved avenues unless authorized to do so by me, the  
34 appointing authority or higher authority.

35  
36 Col Holder: Is that your letter?

37  
38 Col Leta: What's that?

39  
40 Col Holder: What you are reading?

41  
42 Col Leta: Oh. This is from the Commander Directed Investigation Guide.  
43

1 Col Holder: Right.

2  
3 Col Leta: If anyone should approach you regarding your testimony or the matters discussed in  
4 here, you are required to report it immediately to me. Now you've got some questions. And I'll  
5 try to answer whatever questions I can. It's an official investigation. I have to make a report to  
6 Col McClain. And once I've completed my interviews I will do exactly that. And then at some  
7 point I suspect you will get a copy of that report. And I don't know what's going to happen to be  
8 frank.

9  
10 Col Holder: Well what's been happening for five years?

11  
12 Col Leta: That is something beyond the scope of my investigation.

13  
14 Col Holder: Are you privy to that information or not?

15  
16 Col Leta: All I can tell you is what we've talked about. Beyond that I cannot go into details.

17  
18 Col Holder: I don't have any of those disks. That computer is long gone. So I can't recreate  
19 anything I did. Unfortunately. I don't know. All right. Let me make copies of these.

20  
21 Col Leta: Okay.  
22  
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DEPARTMENT OF THE AIR FORCE  
AIR FORCE LEGAL SERVICES AGENCY (AFLSA)

20 JAN 2004

AFLSA/JACL  
1501 Wilson Blvd, 7th Floor  
Arlington, VA 22209

Virginia Z. Houser, Esq.  
BALES WEINSTEIN  
Post Office Box 172179  
Tampa, Florida 33672-0179

Dear Ms. Houser

I have been advised of your telephonic request to depose Col David Leta, USAFR, in the case Inquiry Concerning A Judge, No. 02-487, before the Florida Judicial Qualifications Commission, case number 03-1171. I understand Col Leta's involvement in the case relates to the investigation that he conducted at the direction of the Commander, Air Reserve Personnel Center, into allegations of misconduct made against your client Col Gregory Holder, USAFR. The request to depose Col Leta has been referred to this office for action.

Congress has affirmatively given federal agencies the right to enact certain "housekeeping rules" to govern how agency information will be disclosed. The enabling statute is 5 U.S.C. § 301, which states, in part:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

In addition, the Supreme Court has specifically recognized the authority of agency heads to restrict testimony of their subordinates via such regulations. The principal case in this area is *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 95 L. Ed. 417, 71 S. Ct. 416 (1951). In *Touhy*, the Court dealt with a rule promulgated by the Justice Department requiring their employees to refuse to obey a *subpoena* if so instructed by the Attorney General. The Court held that the housekeeping regulation was valid and provided the employee with an absolute privilege to refuse to obey a *subpoena*. *Id.* at 464.

The Secretary of the Air Force, as the head of the agency, has prescribed regulations governing the release of official Air Force information, whether the release is accomplished through the production of documents or the testimony of current or former Air Force personnel. The Secretary has also delegated to our office the responsibility to review all witness requests and demands for the release of such information, including *subpoenas*, in cases in which the United States is a party to the litigation. See 32 C.F.R Part 97; Department of Defense Directive

EXHIBIT

2

tabbies

5405.2, Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses; and Air Force Instruction 51-301, *Civil Litigation*, Chapter 9 (known collectively as the "*Touhy* regulations").

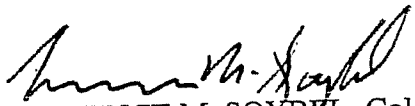
We cannot approve your request at this time because it does not provide the information required by the Air Force *Touhy* regulations. Please make your request in writing to this office and include, in addition to the date, time, and location of the requested appearance of the witness or the production of the documents:

- (1) A detailed explanation of the subject matter and nature of testimony or information sought;
- (2) A detailed explanation of the relevance of the testimony or information to the litigation;
- (3) A detailed explanation of what interest, if any, the Air Force or Department of Defense may have in releasing this information.

In the absence of such a written request and its approval, Col Leta is not authorized to appear and testify at a deposition concerning official Air Force information.

If you have any questions, please contact Lt Col Perry Peloquin, (703) 696-9108.

Sincerely,

  
LAURENCE M. SOYBEL, Colonel, USAF  
Chief, General Litigation Division

cc:

Col Leta

AFLSA/PR (Col Jaster)